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No. 08-993

IN THE
Supreme Court of the United States

BEST WESTERN ENCINA LODGE & SUITES; ENCINA-PEPPER TREE, LTD.; JEANETTE WEBBER; CECILIA E. VILLINES,

Petitioners,

v.

HOLLYN D'LIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff has standing to maintain an Americans with Disabilities Act (ADA) claim against a hotel if the plaintiff demonstrates an intent to return to the area where the hotel is located and a desire to stay at the hotel if it were made accessible.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners seek this Court's review of a fact-bound decision that correctly applied well-established Article III standing principles to an Americans with Disabilities Act (ADA) claim for injunctive relief. Petitioners have failed to show any compelling reason to grant the writ. First, petitioners argue that the decision below conflicts with this Court's constitutional standing jurisprudence, but review of the decision shows that the court of appeals faithfully applied the applicable standing principles to the record in this case. Second, petitioners claim that the decision below conflicts with the decisions of other courts, but every case cited by petitioners rests on the same legal standards, and any differences in outcomes are easily explained by differences in the facts of each case. Finally, petitioners employ attention-grabbing catch-phrases such as "judicial hellhole" and "vexatious litigation" in an attempt to suggest that their policy arguments against the ADA's private enforcement scheme inject an important issue of law into this fact-bound case. The petition for a writ of certiorari should be denied.

STATEMENT

On December 13, 2001, Hollynn D'Lil checked into a room at the Best Western Encina Lodge & Suites in Santa Barbara, California (Best Western Encina). D'Lil, who requires a wheelchair for mobility, had been told when she reserved the room that it was fully wheelchair accessible, except for its lack of a roll-in shower. Pet. App. 2a. When she arrived, however, she discovered numerous barriers to accessibility, such as a lack of van-accessible parking spaces near the rooms designated wheelchair accessible; door hardware, heating controls, and lamps that were too high or too far from a clear path for her to use; and a

bathroom that was blocked by furniture and had a toilet that was too low to the ground. *Id.* at 2a-3a. On December 13, 2002, D'Lil filed this suit under Title III of the Americans with Disabilities Act of 1990 (ADA) and California civil rights laws.

The case was settled pursuant to a consent decree that required defendants to construct fully ADA compliant guestrooms and to improve access to other facilities, including the public restrooms, swimming pool, and restaurant. The consent decree reserved the issue of attorney's fees. After D'Lil filed a motion for fees and defendants responded, the district court *sua sponte* ordered the parties to address D'Lil's standing. The parties briefed the issue, and the district court held an evidentiary hearing, after which it decided that D'Lil lacked standing, finding that she had not presented sufficient evidence to show that she intended to return to the Best Western Encina at the time she filed her complaint. *Id.* at 34a-36a.

The court of appeals reversed. The court explained that, to establish standing, a plaintiff must show that she has suffered an actual or imminent injury in fact, *id.* at 7a, and further explained that the "evidence relevant to the standing inquiry consists of 'the facts as they existed at the time the plaintiff filed the complaint.'" *Id.* (citations omitted). Where the place of public accommodation being sued is far from a plaintiff's home, the court went on, the plaintiff can establish an injury sufficient to confer standing by demonstrating an intent to return to the geographic area and a desire to visit the public accommodation if it is made accessible. *Id.* at 9a.

The court found that, on the record in this case, "there can be little doubt" that D'Lil demonstrated that, at the time she filed her complaint, she intended to return to the Santa Barbara area and desired to stay at the Best Western Encina if it were made accessible. *Id.* The court noted that D'Lil regularly visited Santa Barbara before, during, and after her stay at the Best Western Encina. In particular, D'Lil's declaration and testimony at the evidentiary hearing demonstrated that from 1993 to 2000 she visited the area approximately one to three times per year for work, that she took three trips to the area in 2001, that she took four trips to the area between her stay at the Best Western Encina and when she filed her declaration, and that, at the time of the evidentiary hearing, she was planning on taking three additional trips to the area. *Id.* at 9a-10a. The court also found that "D'Lil's desire to stay at the Best Western Encina on future trips to Santa Barbara if it were made accessible" was "well supported by the evidence that she submitted at each successive stage of the litigation," *id.* at 10a, including in her complaint, where she specifically stated that she would like to return to the hotel, and at the evidentiary hearing, where she explained why she would want to stay there if it were fully accessible. *Id.* at 11a.

The court of appeals found "somewhat baffling" the district court's conclusion that D'Lil had not presented evidence of her intent, at the time the complaint was filed, to return to the Best Western Encina. *Id.* at 12a. "That she [intended to return as of December 13, 2002] is the obvious and most reasonable inference to be drawn from her testimony," it explained. *Id.* The court pointed out that D'Lil's testimony established that "she was a frequent

traveler to Santa Barbara during the relevant time period," and that "she had at least one concrete plan to return to the Santa Barbara area at the time she filed suit." *Id.* at 13a. Moreover, the court noted that D'Lil had provided detailed reasons in her testimony for why she would like to stay at the Best Western Encina if it were made accessible, and that because she had not returned to the hotel since she filed suit, her "stated reasons for preferring the Best Western Encina at the evidentiary hearing were necessarily based on impressions of the hotel that were formed, and that she held, at the time that she stayed there and subsequently filed suit." *Id.* at 13a-14a. The court concluded that D'Lil's testimony "plainly evidence[d]" an intent to return to the Best Western Encina at the time she filed her complaint, and, therefore, she had established an actual or imminent injury sufficient to confer standing. *Id.* at 14a.

Finally, the court addressed concerns that the district court had raised about D'Lil's credibility based on her involvement in past ADA litigation and the fact that she had not yet returned to six hotels in Redding that she had previously sued. First, the court noted that although the district court expressed concerns, it had "explicitly declined to decide the credibility issue." *Id.* at 14a. The court pointed out that there was no evidence in the record about whether the six hotels had been made accessible so that D'Lil could return. Moreover, it explained, "whether or not D'Lil visited the hotels in Redding says little about her intent to visit the Best Western Encina, considering that D'Lil identified specific reasons . . . for returning to Santa Barbara," and the district court's "speculation about the plausibility of D'Lil's intent to return to each place of

public accommodation that she sued is further undermined by evidence of D'Lil's extensive and frequent travel throughout the state." *Id.* at 16a. Overall, the court concluded that the district court's statements on credibility did not disturb its "conclusion that D'Lil sufficiently established her standing to sue." *Id.* at 14a.

Judge Rymer dissented in part, disagreeing with the majority over whether the district court's credibility concerns were justified and over whether D'Lil showed "any concrete plan or intent to return to the Best Western Encina as of the time she filed her complaint." *Id.* at 22a. Defendants' petitions for rehearing and rehearing en banc were denied, with no judge requesting a vote on whether to rehear the matter en banc. *Id.* at 47a.

REASONS FOR DENYING THE WRIT

I. The Decision Below Is Consistent with This Court's Standing Jurisprudence.

Petitioners' primary argument for review is that the decision below "conflicts with this Court's constitutional standing jurisprudence." Pet. 13; *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974). But in all three ways in which petitioners claim there is a conflict, the court of appeals expressly followed this Court's precedents.

First, although petitioners contend that the decision below "conflicts with this Court's holding that a plaintiff must establish that standing existed at the time the action was filed," Pet. 15, the court of appeals expressly stated that "[t]he evidence relevant to the standing inquiry

consists of the facts as they existed *at the time the plaintiff filed the complaint.*" Pet. App. 7a (citations and internal quotation marks omitted) (emphasis added). And the court specifically held that D'Lil demonstrated her "intent to return *at the time that she filed suit.*" *Id.* at 14a (emphasis added). Thus, petitioners' suggestion that the court of appeals held that D'Lil could establish standing even if she had not proven any intent to return to the Best Western Encina at the time she filed her complaint is without merit, and the claimed conflict with this Court's decisions in *Lujan*, *Lyons*, and *O'Shea* is illusory.

Similarly, although petitioners claim that the court of appeals did not adhere "to the requirement that a plaintiff must show a 'real' and 'imminent' threat of injury to have standing," Pet. 17-18 (citing *Lujan*, 504 U.S. at 564; *Lyons*, 461 U.S. at 105, 110), the court of appeals expressly stated that plaintiff needed to show an "actual or imminent" injury, Pet. App. 7a (quoting *Lujan*, 504 U.S. at 560-61), and specifically held that D'Lil had done so. *Id.* at 14a. Petitioners assert that the court erred in discussing D'Lil's prior visits to the Santa Barbara area, arguing that a past injury does not show a present case or controversy. Pet. 17. But the court of appeals did not cite D'Lil's past visits to show that those visits alone established her standing. Rather, the court of appeals noted that "the regularity with which she visited the city before, during, and after her stay at the Best Western Encina," Pet. App. 9a-10a, demonstrated that she was a "frequent traveler to Santa Barbara during the relevant time period." *Id.* at 13a. Petitioners also argue that a statement D'Lil made about her upcoming work in the Santa Barbara area did not establish a real or imminent plan on her part to return.

Pet. 18. But the court of appeals did not rely only on that statement to conclude that D'Lil had a "concrete plan to return to the Santa Barbara area at the time she filed suit[,]" but also on the fact that D'Lil had spent an afternoon looking for an accessible hotel for that trip, and thus "had already begun to plan for [a specific upcoming trip] at the time that the complaint was filed." Pet. App. 13a n.9.

Finally, contrary to petitioners' claim that "the court of appeals ignored this Court's express holding that the plaintiff's burden is to establish each element of standing 'with the manner and degree of evidence required at the successive stages of the litigation[,]'" Pet. 19 (quoting *Lujan*, 504 U.S. at 561), the Ninth Circuit stated explicitly that each of the elements of standing must be supported "with the manner and degree of evidence required at the successive stages of litigation." Pet. App. 7a (quoting *Lujan*, 504 U.S. at 561). Petitioners further assert that the court below erred by relying on the complaint and summary judgment declaration even though the district court had held an evidentiary hearing, but the summary judgment declaration was admitted into evidence at the hearing. Transcript of Evidentiary Hearing Re: Standing at 85-86 & 110 (admitting summary judgment declaration as Exhibit 102). Moreover, the court of appeals concluded that D'Lil's *testimony* evidenced an intent to return to the Best Western Encina sufficient to confer standing. Pet. App. 14a. Thus, there is no conflict between the decision below and this Court's standing jurisprudence.

In the end, petitioners' claim of multiple departures from this Court's precedents is, at most, a simple disagreement with the court of appeal's application of

properly stated rules of law to the facts of this case. Even if the court below had erred in its application of the law to the facts, this case would not be worthy of this Court's review. *See* S.Ct. R. 10. But the court of appeals did not err. Rather, it concluded correctly that D'Lil had standing because her testimony demonstrated her intent, at the time she filed suit, to return to the Santa Barbara area and stay at the Best Western Encina if it were accessible. The petition should be denied.

II. The Decision Below Does Not Conflict with the Decision of Any Other Court.

Petitioners claim that there is a circuit split regarding the degree of rigor with which the courts of appeals apply this Court's standing jurisprudence in cases where plaintiffs seek injunctive relief under the ADA. Pet. 21. But an examination of the cases petitioners cite reveals no such conflict.

Petitioners rely primarily on *Shotz v. Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001), in which the Eleventh Circuit affirmed the dismissal of an ADA complaint for lack of standing to seek injunctive relief because the plaintiffs had not even alleged any intent to return to the building at issue. *Shotz* is easily distinguished from this case because the court below determined that D'Lil's testimony established her intent to return to the Best Western Encina at the time that she filed suit. Pet. App. 14a. Petitioners also rely on the Eleventh Circuit's unpublished decision in *Access for America, Inc. v. Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (per curiam), but under Eleventh Circuit Rule 36-2, an unpublished decision of that court is not binding circuit

precedent. Thus, *Access for America* cannot establish a circuit split because no court is bound to follow the decision. In any event, *Access for America* does not conflict with the decision below because it affirmed in cursory fashion a dismissal for lack of standing to seek injunctive relief where the plaintiff "could not demonstrate that there was any reasonable chance of his revisiting" the facility at issue. *Id.* at 818. Again, in this case, the court of appeals concluded that D'Lil had made such a demonstration. Pet. App. 14a.

Petitioners also assert that the decision below conflicts with the D.C. Circuit's decision in *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994), but that case did not involve the ADA or an analysis of a plaintiff's intent to return to a place where she had been subjected to unlawful conditions. Rather, *Animal Legal Defense Fund* was an Administrative Procedure Act (APA) challenge to an agency regulation. The court found that one plaintiff lacked standing to seek injunctive relief because she had not shown an injury presently suffered or imminently threatened where she "merely state[d] that at some undefined future time" she might again engage in activities that she had not pursued during the previous six years, *id.* at 500, and that the other plaintiff's claim "amount[ed] to nothing more than an attempt to compel executive enforcement of the law, detached from any factual claim of injury," *id.* at 501. In contrast, the court below concluded that D'Lil had demonstrated a specific intent to return to the Best Western Encina at the time she filed suit and, therefore, had "suffered an 'actual or imminent' injury sufficient to confer standing." Pet. App. 14a. Because the plaintiffs in *Animal Legal Defense Fund* were not

similarly situated to the plaintiff in this case, the decisions do not conflict.

Having cited only three appellate cases that they claim conflict with the decision below—none of which presents an actual conflict—petitioners attempt to bolster their claim of a circuit split by citing two cases that they assert are consistent with the Ninth Circuit's decision here. Pet. 23 (citing *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d Cir. 2008) (per curiam); *Steger v. Franco, Inc.*, 228 F.3d 889, 891-92 (8th Cir. 2000)). Because the petitioners have failed to identify any appellate decisions that conflict with the decision below, their citation of non-conflicting decisions by other courts provides no basis to grant review. Rather, that the Second Circuit in *Camarillo* and the Eighth Circuit in *Steger*, like the court below, have found that plaintiffs have standing to pursue ADA claims where they intend to return to the offending establishments shows that there is no compelling reason for this Court to address the question presented here.

Unable to show any conflict at the appellate level, petitioners cite a handful of district court decisions that they claim "are in tension with or flatly contradict the outcome reached by the decision below." Pet. 24. But the cases petitioners cite apply the same law as the court below—the outcomes differ only because of differences in the facts. For example, petitioners cite *Blake v. Southcoast Health System, Inc.*, 145 F. Supp. 2d 126 (D. Mass. 2001). But the court in *Blake*, noting that "every court to have considered the standing requirements under Title III of the ADA has held that in order for a private litigant to prove standing, she must show a risk of future harm[,]" *id.* at 132-33, held that a decedent's estate lacks

standing to seek injunctive relief under the ADA because the decedent cannot further be harmed by the discrimination, *id.* at 137. *Blake* does not conflict with the decision here because D'Lil's testimony demonstrated that she was at risk of future harm because she intended to return to Santa Barbara and desired to stay at the Best Western Encina if it were accessible. Pet. App. 14a.

Petitioners also cite *Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1253 (M.D. Fla. 2003), in which the district court dismissed the plaintiff's ADA complaint against a motel for lack of standing because the plaintiff failed to demonstrate "anything but a speculative or conjectural future injury." The plaintiff in *Rosenkrantz* traveled only twice a year and on a route that "comes nowhere near" the defendant motel, had been to the area of the motel only once, and had no specific plans to ever return. *Id.* The decision in *Rosenkrantz* does not conflict with the decision below because both decisions applied this Court's decision in *Lujan*. The results differed only because of factual differences between the two cases. As opposed to the plaintiff in *Rosenkrantz*, D'Lil was a frequent traveler to the area of the defendant hotel and had specific plans for future trips to the area at the time she filed her suit. Pet. App. 9a-14a. Similarly, in *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368 (M.D. Fla. 2004), the district court applied the same standing jurisprudence as the court below but found that the plaintiff lacked standing based on facts different from those presented by D'Lil. The plaintiff in *Brother* discovered the defendant hotel by chance while driving an indirect route to his destination, did not stay at the hotel, does not ordinarily travel to the area where the hotel is

located, professed only a general intent to return to the area, and gave inconsistent testimony about his frequency of travel. *Id.* at 1371.

Finally, petitioners assert that the decision below conflicts with three district court decisions that considered a plaintiff's history of ADA litigation in assessing the credibility of a plaintiff's professed intent to return to a particular facility. Pet. 25-26 (citing *Brother*, 331 F. Supp. 2d at 1374-75; *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1046 (C.D. Cal. 2005); *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1279, 1284-85 (M.D. Fla. 2004)). The cases cited by petitioners do not demonstrate a conflict with this case for three reasons. First, the court below did not hold that litigation history may never be considered in assessing the credibility of a professed intent to return, but instead noted that "[t]he attempted use of past litigation to prevent a litigant from pursuing a valid claim in federal court warrants [the court's] most careful scrutiny." Pet. App. 15a (citing *Outley v. City of New York*, 837 F.2d 587, 592 (2d Cir. 1988)). Second, in this case, "the district court explicitly declined to decide the credibility issue[.]"[1] Pet. App. 14a. Third, to the extent the district court focused on D'Lil's history of ADA litigation as a basis for questioning the sincerity of her intent to return to the Best Western

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[1]Even if the question presented included whether litigation history is relevant to determine the credibility of a plaintiff's intent to return, this case would be a poor vehicle to address the issue because the district court did not decide it. Further, the court of appeals found it unnecessary to reach significant due process issues raised by D'Lil regarding the scope of the evidentiary hearing with regard to prior litigation. Pet. App. 4a n.4.

Encina, the court of appeals rejected any "purported adverse credibility determination" under the facts of this case because "D'Lil identified specific reasons" for returning to Santa Barbara and for wanting to stay at the Best Western Encina if it were made accessible. *Id.* at 16a. In contrast, in the cases cited by petitioners, the plaintiffs offered only generalized statements of an intent to return.

In sum, petitioners have not identified any decisions that conflict with the decision below on an issue of law. At most, petitioners have identified cases where courts reached different results because of different facts. There is no reason to believe that the outcome of this case would have been any different had it been litigated in another forum, and there is no reason for this Court to review the decision below.

III. Petitioners' Policy Disagreement with the ADA's Private Enforcement Mechanism Does Not Provide a Basis to Grant the Petition.

The final section of the petition criticizes Congress's decision to rely on a private right of action as a means of promoting the ADA's goal of equal access for people with disabilities. *See* Pet. 27-31. Petitioners argue that serial litigation aimed at ensuring compliance with the law has imposed burdens on businesses and the judicial system, even as petitioners acknowledge that "[t]he value of this serial litigation in vindicating the purposes of the ADA is a subject of legitimate debate." *Id.* at 29; *see* Cari Becker, *Private Enforcement Of The Americans With Disabilities Act Via Serial Litigation: Abusive Or Commendable?*, 17 Hastings Women's L.J. 93 (2006). Whatever the merits of petitioners' criticism of the statutory scheme, such

criticism does not provide a basis for this Court to grant review. The court below faithfully applied the applicable standing principles to the record in this case and concluded that D'Lil had "demonstrate[d] her intent to return to the Santa Barbara area and, upon her return, her desire to stay at the Best Western Encina if it is made accessible." Pet. App. 9a. If petitioners believe that the ADA is in need of reform they should seek a legislative solution because "[o]nly Congress can respond to vexatious litigation tactics that otherwise comply with its statutory frameworks." *Brother*, 331 F. Supp. 2d at 1375.

CONCLUSION

The petition for a writ of certiorari should be denied.

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INTRODUCTION

Petitioners demonstrated that the decision below conflicts with this Court's constitutional standing jurisprudence requiring concrete proof of a real and imminent threat of future injury to pursue injunctive relief. Respondent's opposition fails to show otherwise. Contrary to respondent's claim, the decision below also conflicts with that of other federal courts that have faithfully applied this Court's standing requirements. Finally, respondent fails to refute petitioners' showing that this case raises a recurring and important question of federal standing law because the court of appeals' dilution of standing principles in the ADA context has and will contribute to the proliferation of private enforcement actions in which plaintiffs have no personal stake in the injunctions they seek.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioners demonstrated (Pet. at 13-21) that the decision below merits review because it conflicts with this Court's holdings under Article III that plaintiffs must proffer concrete proof of a real and imminent threat of future injury to pursue injunctive relief. Respondent's attempt to reconcile the court of appeals' decision with those cases is unavailing.

This Court's recent decision in *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142 (2009), confirms the disconnect between the Ninth Circuit's ruling and this Court's standing doctrine. In *Summers*, this Court reaffirmed the fundamental importance of the separation of powers principles that underlie the

doctrine of standing. This Court reiterated that the standing requirement "'is founded in concern about the proper – and properly limited – role of the courts in a democratic society,'" *id.* at 1148 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)), and restricts the judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* In this regard, the Court emphasized the importance of the "imminent" harm requirement by refusing to "replace" it with a lesser requirement that the dissent proposed. *Id.* at 1152-53. The Court also emphasized that plaintiffs must have a personal stake in the relief sought such that this relief would "affect *them*." *Id.* at 1149. The Ninth Circuit's ruling ignores these fundamental requirements.

Respondent argues that there is no conflict between the decision below and this Court's decisions because the court of appeals cited and quoted language from those decisions in its rulings. See, *e.g.*, Opp. at 2, 5-6. To be sure, as petitioners acknowledged, see Pet. at 15, the Ninth Circuit paid lip service to this Court's standing decisions. Federal courts, however, must do more than merely parrot constitutional principles that this Court has established. They must adhere to them. The Ninth Circuit failed to do so here, in three respects.

1. Petitioners demonstrated that the Ninth Circuit's decision conflicts with this Court's holding that plaintiffs must establish that standing existed at the time the action was filed. Pet. at 15-16 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992)). Specifically, petitioners demonstrated – and respondent does not dispute – that the district court found that respondent presented "no evidence" at the

evidentiary hearing of her intent to return to the hotel at the time the complaint was filed because she was asked "no questions" that would elicit the relevant testimony. See Pet. App. 34a-35a.

Respondent merely points out that the Ninth Circuit recited the legal rule from *Lujan* and made a finding that tracks that rule, Opp. at 6, without confronting the district court's unequivocal finding of a complete absence of evidence that could satisfy respondent's burden of proof on this issue. Indeed, the Ninth Circuit conceded that respondent "was never explicitly asked whether she intended to return as of" the date the complaint was filed, and instead based its finding on "inference[s]" that it drew from her testimony about a later time period, Pet. App. 12a. The district court, however, did not draw these inferences and instead reached the diametrically opposite conclusion that the only plausible inference to draw from respondent's failure to address "obviously relevant" matters was that "the answers would not have established standing." *Id.* at 35a; see also *id.* at 20a (Rymer, J., noting that the relevant evidence "would have been but one question away"). The Ninth Circuit's sleight of hand with respect to the evidentiary gap simply cannot be reconciled with this Court's holding that plaintiffs must demonstrate a "real and immediate threat" of repeated injury at the time suit is filed, and not some later time. *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-02 (1983); *Lujan*, 504 U.S. at 569 n.4.

2. Petitioners next demonstrated that the court of appeals abandoned any semblance of adhering to the requirement that plaintiffs must show a "real and immediate threat" of repeated injury to have standing to seek injunctive relief. Pet at. 16-19. As noted, this Court recently confirmed its strict

adherence to this requirement in *Summers*, 129 S. Ct. at 1148, 1152-53. Petitioners showed that the court of appeals' sole basis for finding that respondent had an intention to return to the hotel was her suggestion of a *possible* future business trip that *might* bring her *near* Santa Barbara at an *unspecified time* – a mere "some day" intention that cannot support a finding of a threat of imminent injury under this Court's precedent. See Pet. at 17-19; see also *Summers*, 129 S. Ct. at 1150-51 (confirming that "some day" intentions, *i.e.*, purported intentions that are not concrete and that lack a specific time frame, are insufficient to satisfy the real and immediate threat requirement).

Respondent again asserts that the Ninth Circuit recited the legal requirements contained in this Court's decisions and made findings that track these requirements. Opp. at 6-7. She further asserts that the Ninth Circuit's finding of standing is consistent with this Court's holdings because the court of appeals not only relied on the statement about the potential business trip, "but also on the fact that D'Lil had spent an afternoon looking for an accessible hotel for that trip." *Id.* at 7.

Respondent does not cite the single snippet of testimony that the Ninth Circuit relied on, for good reason: it does not support the court of appeals' finding of a concrete or imminent plan on her part to return to the Encina Lodge. Respondent's testimony (which the Ninth Circuit quoted only in part) was that she "thought [she] would be doing some more work in Solvang, and the Ramada is well-positioned between Solvang and Montecito." See Transcript of Evidentiary Hearing Regarding Standing ("Evid. Hrg. Tr.") at 50; compare Pet. App. 13a n.9. Respondent's "thought" that she might get additional work in Solvang – a city that is approximately 33 miles from

Santa Barbara – at an unspecified future time in no way establishes either a concrete or imminent plan to return to Santa Barbara. See *Summers*, 129 S. Ct. at 1150-51 (a "vague desire to return" to an area "is insufficient to satisfy the requirement of imminent injury"). Moreover, this testimony in fact *undermines* respondent's claim of an intention to return to the *Encina Lodge* because it shows that she was seeking a *different hotel* for this potential trip.[1]

In sum, at the absolute most, respondent's testimony established a mere "some day" intention on her part to return to the Encina Lodge, which this Court held in *Lujan* and reaffirmed in *Summers* is insufficient to establish standing. The Ninth Circuit simply ignored the principles established by this Court in finding standing here.

3. Finally, petitioners demonstrated that the court of appeals ignored this Court's decisions by relying on allegations in the complaint and statements from respondent's summary judgment declaration to fill the gaps in her testimony at the evidentiary hearing. Pet. at 19-20 (citing *Lujan*, 504 U.S. at 561, and *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990)). Respondent does not dispute that the court of appeals relied on allegations in the complaint and statements from respondent's summary judgment declaration, but instead argues that such reliance was appropriate – at least with respect to the declaration – because it was admitted into evidence at the hearing. Opp. at 7.

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[1] Similarly, respondent's testimony that she spent an afternoon looking for an accessible hotel in Santa Barbara for this hypothetical future trip, *see* Opp. at 7, cannot support – and again undermines – her claim that she sought to return *to the Encina Lodge*. Her testimony was that she "went to the Ramada Limited" to "check it out." *See* Evid. Hrg. Tr. 49-51.

This ignores, however, that once respondent's sworn testimony was tested through cross-examination at the hearing, her prior allegations and assertions – which were not so tested – should have "fall[en] by the wayside." Pet. App. 19a (Rymer, J., dissenting). This Court's express holding that the plaintiff's burden is to establish each element of standing "with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561, is not a mere technical rule of procedure. The "facts" that establish standing in the ADA context are entirely within the plaintiff's knowledge and control. Accordingly, when plaintiffs have a full opportunity to make their case for standing at a hearing (as respondent did here), the relevant record is the testimony of the plaintiff – not earlier assertions in pleadings and motions. The Ninth Circuit ignored this Court's decisions in holding otherwise.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS THAT REQUIRE ADA PLAINTIFFS SEEKING INJUNCTIVE RELIEF TO PRESENT ROBUST PROOF OF IMMINENT INJURY.

Petitioners further demonstrated (Pet. at 21-27) that the decision below merits review because it conflicts with decisions of other federal courts that have faithfully applied this Court's standing cases in the context of plaintiffs seeking injunctive relief under the ADA and other statutes. *Amicus Curiae* National Federation of Independent Businesses ("NFIB") demonstrated that lower federal courts have issued inconsistent decisions on the relevance and comparative importance of the factors that courts typically examine to determine the likelihood that an

ADA plaintiff will return to a particular public accommodation. See NFIB Br. 14-20. Respondent's attempt to reconcile and harmonize the lower court decisions is unavailing.

In material respects, *Shotz* v. *Cates*, 256 F.3d 1077 (11th Cir. 2001), is an analog to this case: both involve mere allegations of past discrimination, the absence of evidence of an actual attempt to return to the public accommodation, and no assertion of an intent to return at the time the complaint was filed. Yet the Eleventh Circuit dismissed the plaintiffs' case for lack of standing on the ground that any likelihood of future discrimination was merely "'conjectural, hypothetical, or contingent,'" *id.* at 1082, while the Ninth Circuit found standing to exist. It is not enough to assert, as respondent does, that the cases are distinguishable because "the court below determined that [respondent's] testimony established her intent to return" to the Encina Lodge, Opp. at 8, because if the Eleventh Circuit had confronted the same record the Ninth Circuit faced in this case, the Eleventh Circuit likely would have dismissed. That is reason enough for the Court to grant certiorari.

Similarly, in *Access for America, Inc.* v. *Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (per curiam), the court dismissed an ADA complaint for lack of standing because the plaintiff failed to establish "any reasonable chance of . . . revisiting" the targeted facility, "other than 'someday.'" *Id.* at 818. Here, in contrast, the Ninth Circuit inferred that revisitation was probable from mere evidence of a "some day" possibility. These disparate outcomes are directly attributable to the Eleventh Circuit's faithful adherence to this Court's standing decisions and the Ninth Circuit's refusal to abide by them. That *Access for America* is unpub-

lished does not affect the reality of inter-circuit conflict here; although no court may be bound, district courts nonetheless rely on whatever guidance is available, and their doing so here inevitably will drive results in the Eleventh and the Ninth Circuits in divergent directions.

Moreover, that *Animal Legal Defense Fund, Inc.* v. *Espy*, 23 F.3d 496 (D.C. Cir. 1994), did not involve the ADA is immaterial. Constitutional standing jurisprudence neither varies with nor depends on the underlying cause of action. In *Animal Legal Defense*, the plaintiffs' showing of likelihood of repeated injury was held insufficient for Article III standing based on evidence not meaningfully different from what respondent offered and what the Ninth Circuit declared constitutionally adequate here.

Respondent misunderstands the import of *Camarillo* v. *Carrols Corp.*, 518 F.3d 153 (2d Cir. 2008) (per curiam), and *Steger* v. *Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000), two decisions that – like the Ninth Circuit's decision here – effectively abandoned the requirement that an ADA plaintiff demonstrate a risk of repeated injury by presenting evidence of concrete future plans to return to the facility at issue. These decisions demonstrate that the Ninth Circuit is not alone in departing from this Court's standing holdings in the ADA context. This bolsters the case for certiorari because a growing body of lower court precedent is swallowing this Court's standing rules.

Respondent also attempts to dismiss the numerous district court decisions that are in tension with or flatly contradict the outcome reached by the decision below, see Pet. at 24-26, on the ground that the Ninth Circuit purported to apply "the same law" as the district courts and "the outcomes differ only because of differences in the facts." Opp. at 10. It is always

true, of course, that cases involve different facts and it is true here that the court of appeals used language that tracks this Court's opinions. But the standards that courts employ must be measured by their actions and the outcomes that they reach, and not merely their words. Here, the plaintiffs in the cases that petitioners cite were all found to lack standing and, therefore, not permitted to proceed with their ADA injunctive suits. To be sure, the facts of those cases are not identical to the facts here, but they are strikingly similar in material respects – due in no small part to the common *modus operandi* employed by repeat ADA litigants who target hotels and other public accommodations.[2] The fact that respondent was found to have standing to pursue her suit simply cannot be reconciled with the outcomes of these other cases. This inconsistent application of Article III principles, which has resulted in disparities in access to the federal courts for similarly situated plaintiffs, is intolerable and warrants this Court's review.

In all events, because Article III is so fundamental to a proper separation of powers under the Constitution, this Court has granted certiorari to address Article III standing questions even in the absence of a clear conflict among the circuits. See, *e.g.*, *Summers*, 129 S. Ct. 1142.

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[2] As noted, Pet. at 27-29, serial ADA plaintiffs often target structures built before the ADA was enacted and demand that the current access requirements be met at great expense, even though they have no real need to use, or intent to return to, the facilities. Respondent, for example, sued and settled with six hotels that she visited in Redding, California on a single day, and has never returned to any of them or even checked to see whether the remediation was completed. *See id.* at 8.

III. THE COURT OF APPEALS' ADA STANDING RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Petitioners also demonstrated (Pet. at 27-31) that the court of appeals' dilution of this Court's standing principles in the ADA context presents a recurring and important question of federal law because it will contribute to the proliferation of ADA private enforcement actions in which the plaintiffs have no real or personal stake in the injunctive relief that they seek. NFIB provided additional compelling evidence of the enormous growth in and deleterious effects of serial ADA injunctive suits, and the inevitable role that the court of appeals' decision will have in facilitating such suits. In particular, NFIB documented the "devastating effects" of such suits on small businesses, which are often "targeted" by ADA plaintiffs and their counsel. NFIB Br. 6, 9; see also *id.* at 8-9 (noting that such suits have not only caused job and revenue losses, but also have caused small businesses to fail).

Respondent does not attempt to deny the explosion in serial ADA litigation or the societal and economic costs that it imposes – a phenomenon that federal courts have recognized and documented. See Pet. at 27-30. Instead, respondent asserts that petitioners are merely criticizing "Congress's decision to rely on a private right of action" and "the statutory scheme." Opp. at 13. This argument is wide of the mark. Petitioners have no quarrel with the availability of the private right of action or the remedies that the ADA provides.

Petitioners' argument is that this case presents an important question of federal standing law because the decision below eviscerates constitutional principles that this Court has established to ensure that

federal courts – which are courts of limited jurisdiction – entertain suits for injunctive relief only when the plaintiffs face a real and immediate threat of future injury. These standing principles apply to all suits, including ADA suits. See *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997) (refusing to relax Article III standing principles "for the sake of convenience and efficiency"). Indeed, as shown, Pet. at 30, in the ADA context, standing principles serve as a critical check to ensure that plaintiffs have a personal stake in the injunctive relief they seek. Here, however, the Ninth Circuit abandoned this Court's standing principles and allowed an ADA private enforcement suit to go forward in circumstances where the plaintiff failed to show any personal stake or any threat of immediate repeated injury – thereby facilitating the growing "cottage industry" in similar suits. The court of appeals' departure from Article III standing principles in the ADA context therefore presents an important question of federal law that only this Court – and not Congress – can address.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

BEST WESTERN ENCINA LODGE & SUITES, ET AL.,

Petitioners,

v.

HOLLYNN D'LIL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus* is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF THE ARGUMENT

In addition to the reasons set forth in the Petition, which convincingly demonstrate that this case warrants the Court's attention, the Court should be aware of additional reasons that make this an appropriate case for Supreme Court review. First, frivolous Americans with Disabilities Act ("ADA") litigation is enormously harmful to small businesses across the country. This Court should grant certiorari so that America's small businesses are better able to defend against meritless lawsuits. Second, the Ninth Circuit's decision that D'Lil had standing to bring this suit is clearly at odds with this Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). This Court should grant certiorari to reverse this incorrect decision. Finally, widespread confusion amongst federal courts regarding ADA standing requirements precipitated the Ninth Circuit's erroneous decision. We ask this Court to grant certiorari so that the lower courts can benefit from this Court's guidance in deciding future cases.

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[1] Pursuant to Rule 37.2, *amicus curiae* provided counsel of record for all parties 10 days notice of its intention to file an amicus brief. Counsel for petitioners consented to the amicus brief in writing. Respondent's counsel refused consent. Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the accompanying brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

REASONS FOR GRANTING THE PETITION

I. DUBIOUS SUITS LIKE D'LIL'S HAVE WROUGHT ENORMOUS HARM ON SMALL BUSINESSES

Review of this case will help ensure that the ADA fulfills its intended purpose of protecting disabled individuals from discrimination. The ADA was signed into law by President George H.W. Bush on July 26, 1990. The stated goal of the legislation was to eliminate discrimination against individuals with disabilities. 42 U.S.C. § 12101(b). The statute thus sought to remedy a variety of problems, among them the barriers that disabled individuals face in accessing places of public accommodation like restaurants, hotels, and movie theaters. U.S. Small Business Administration and U.S. Department of Justice, Americans with Disabilities Act: ADA Guide for Small Businesses 1 (1999), *available at* http://www.sba.gov/ada/smbusdgd.pdf.

Yet ADA litigation is growing far more dramatically than its congressional drafters might have imagined. The profitability of this litigation has given birth to a veritable "cottage industry." *See, e.g., Rodriguez v. Investo LLC*, 305 F. Supp. 2d 1278, 1280-81 (M.D. Fla. 2004). Ambitious plaintiffs' lawyers have an easy time finding such targets because the ADA's requirements are so complex. The ADA regulates everything from the permissible height of countertops and mirrors in newer or renovated buildings, to the weight of swinging entrance doors, to the exact location where grab bars must be located in toilets. Walter K. Olson, *The ADA Shakedown*

Racket, City Journal, Winter 2004, *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html. One estimate indicates that an average bathroom has to meet 95 different standards. *Id.*

A senior vice president of the American Association of People with Disabilities, recently observed, "I have not found anything that's 100 percent compliant with the ADA." *Id.* Another estimate holds that less than 2 percent of businesses nationwide are actually in full compliance with the ADA. Carri Becker, Note, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation; Abusive or Commendable?* 17 Hastings Women's L.J. 93, 99 (Winter 2006). The Department of Justice and the Equal Employment Opportunity Commission attempted to solve this problem by issuing an ADA guide for business owners. It is telling, though, that one such document touted as "user friendly" by both agencies is over 600 pages long. *See* Equal Employment Opportunity Commission & Department of Justice, *Americans with Disabilities Act Handbook* (1992).

The plaintiffs' lawyers schemes typically work as follows: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have the potential plaintiff seek out any and all violations of the ADA. Instead of informing the business of the omissions and giving the firm an opportunity to come into compliance with the ADA, the plaintiff and her attorney file a lawsuit. Typically, in a letter announcing the plaintiff's intention to sue, plaintiff's counsel offers to drop the lawsuit in exchange for a cash

settlement. *See, e.g.*, Becker at 115 n. 31. Faced with the threat of costly litigation, most businesses agree to pay out the settlement. *See, e.g., Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004).

As one federal court observed, the result of this scheme is that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)." *Mandarin Touch*, 347 F. Supp. 2d at 863 (*quoting Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004)). Serial plaintiffs serve as "professional pawn[s] in an ongoing scheme to bilk attorney's fees." *Id.* (quoting *Rodriguez*, 305 F. Supp. 2d at 1285). It is a "type of shotgun litigation [that] undermines both the spirit and purpose of the ADA." *Id.* (quoting *Brother*, 331 F. Supp. 2d at 1375).

In one typical case, the Philadelphia firm Brodsky & Smith filed over 100 lawsuits within a six-month time period on behalf of two disabled men, reaping thousands of dollars in attorneys' fees. Walter K. Olson, *The ADA Shakedown Racket*, City Journal, Winter 2004, *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html. The two complainants have since established the non-profit American Disability Institute, which plans to roll out 400 to 500 suits a month until more than 5,000 businesses have been cited for ADA violations. *Id.* Only then, these gentlemen claim, will they achieve their mission of bringing all businesses in the Philadelphia area into compliance with the ADA. *Id.*

In another example, a Florida attorney named John Mallah filed 740 such lawsuits against Florida businesses in fewer than four years. Becker, *citing* Bob van Voris, South Florida's ADA Industry, *The National Law Journal*, July 16, 2001, at A1. Mallah brought each of these suits on behalf of his elderly uncle; the pair settled each for approximately $3,000 to $5,000 in legal fees. *Id.*

ADA litigation has also proliferated in California, where plaintiffs can join state law claims to their federal ADA claims and thus recover money damages. Private plaintiffs are not eligible for money damages under the ADA, though they may receive injunctive relief and attorneys' fees. But, in California, most ADA violations also violate California's Unruh Act, for which plaintiffs can receive treble damages. Cal. Civ. Code § 51(f) (West 2008). California plaintiffs therefore typically join their state and federal claims to ensure eligibility for monetary and injunctive relief as well as attorneys' fees.

These drive-by lawsuits disproportionately damage small businesses. First, small businesses are more vulnerable than larger firms. Nationwide, approximately one-third of new small businesses fail within the first two years of operation. U.S. Small Business Administration website, FAQs: Frequently Asked Questions, *at* 1, http://web.sba.gov/faqs/faqindex.cfm?areaid=24 (last visited March 3, 2009). Second, it is also more difficult and expensive for small businesses to comply with the panoply of regulations imposed on them by state and federal governments. The U.S. Small Business Administration reports that small

firms spend an average of 45 percent more per employee than large firms on compliance with federal regulations. Frequently Asked Questions, *supra*, at 1.

NFIB member businesses are targeted by vexatious litigants and their counsel. Jarek Molski filed lawsuits against 400 different businesses before a federal district court finally declared him a "vexatious litigant." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1061 (9th Cir. 2007). Many of his complaints were factually similar, focusing on the configuration of restroom stalls at a business. *Id.* at 1051. He often alleged injuries to his hands or upper extremities when the stalls were too narrow. *Id.* at 1050-51. Molski appeared to have little interest in returning to any of these businesses once the premises had been made safe. Instead, his "consistent approach was to use the threat of money damages under California law to extract cash settlements and move on to his next case." *Id.* at 1052.

Molski frequently targeted small businesses, among them NFIB members. One member reported that he was worried that the litigation and associated renovations could force him out of business. Mike Lee owns a small restaurant in Pismo Beach, Calif. The restaurant only has room for 17 tables, so Lee counts on his ability to maintain a steady flow of customers to keep the business open. Unfortunately, Mr. Molski visited Lee's business in 2005. Molski alleged that the restroom stalls were too small and that he injured his hands during a visit. Molski filed suit and Lee settled. That settlement nearly cost Lee his business. He had to

borrow $80,000 – half of which represented the cost of the renovations and the remainder of which represented the cost of settlement and attorney fees. According to Lee, it took two weeks to renovate the restrooms, and he was only able to keep the restaurant open limited hours during that time. He reports that his sales were drastically reduced during the renovation. Given the cost and the impact on his business, there is a real question as to whether these renovations were even required by the ADA. Yet, despite the cost and ruinous impact on his business, the renovations were a more affordable option than financing litigation with an uncertain outcome.

Sacramento area attorney Scott Johnson implemented a similar scheme. Johnson, who is disabled, files suits on his own behalf seeking both injunctive relief under the ADA and damages under California's Unruh Act. Marjie Lundstrom and Sam Stanton, *The Price of Access, Part 2: Frequent Fliers*, The Sacramento Bee, November 13, 2006. Johnson targets small businesses in the Sacramento area. *Id.* His complaints generally charge businesses with failure to have legally necessary van-accessible parking. *Id.* Although Johnson claims to send warnings to businesses before he files suits, many business owners report never receiving such warnings prior to getting a complaint with a demand for payment of $4,000 or more. *Id.*

Johnson targeted NFIB member Kumar Shankar's business. Shankar's business has a small lot that includes room for tow trucks to drop off cars for repair. Johnson sued, alleging that there was not enough room for disabled parking in the lot.

Shankar paid $3,500 to settle the suit and also spent additional funds reconfiguring the parking lot. The renovation of the parking lot eliminated the tow truck drop zone, causing a dramatic decline in sales. The drop in sales forced Shankar to fire two of his four employees. Though these consequences were devastating for Shankar and his employees, Shankar reports that he had little alternative. Challenging Johnson in court was a more expensive option and might have even forced him to close his business altogether.

ADA lawsuits have led to the closure of other firms. Roy's Drive-In was a landmark in Salinas, Calif., since the 1950s. Becker, citing Jonathan Segal, *Roy's Drive-In Checks Out: Salinas eatery faced lawsuit over access*, Monterey Herald, Sept. 21, 2004, *available at* http://www.montereyherald.com/mld/montereyherald/news/972043.htm. The 61-year-old owner, Roger Patterson, closed his doors after Molski brought suit. *Id.* Patterson said that, while he could have spared the $10,000 necessary to bring the business into compliance, he could not afford to pay legal fees and damages. *Id.*

On Lock Sam, a Chinese restaurant in Stockton, Calif., also closed its doors because of an ADA suit. Becker, citing Howard Lachtman, *On Lock Sam leaves a little less than "contented hearts,"* Record Net, Apr. 2, 2004; *at* http://www.recordnet.com/articlelink/040204/lifestyle/articles/040204-1-9.php. The restaurant was founded in 1898 and was owned by the same family since 1920. *See* Walter Olson, *Access suit closes landmark Calif. eatery*, Overlawyered, Sept. 2, 2003,

available at http://www.overlawyered.com/archives/000291.html. The closing sparked uproar in the Stockton community, with many disabled Stockton residents among those decrying the restaurant's closing. *Id.*

As the above examples demonstrate, frivolous ADA claims – brought by plaintiffs who lack standing under *Lujan* to bring such suits – have devastating effects on small businesses across the nation. These suits contribute directly to the loss of jobs – as in Kumar Shankar's case – and to huge revenue losses as in Mike Lee's case. Lee and Shankar were lucky enough not to lose their businesses because of ADA suits, but the experiences of Roy's Drive-In and On Lock Sam show that other small firms are not so fortunate. If the federal courts continue to construe standing rules liberally in ADA cases, small businesses will suffer irreparable harm from dubious claims.

II. BECAUSE D'LIL'S INJURY IS MERELY CONJECTURAL AND HYPOTHETICAL AND CANNOT BE REDRESSED BY A FAVORABLE DECISION, THE NINTH CIRCUIT'S RULING IN THIS CASE CONFLICTS WITH THE STANDING REQUIREMENTS SET FORTH IN *LUJAN V. DEFENDERS OF WILDLIFE*

This Court's standing jurisprudence is rooted in Article III, Section 2 of the U.S. Constitution, which states that "[t]he judicial power shall extend to all Cases... [and] to Controversies." This constitutional standing requirement serves as a check on the power of the judiciary in accordance

with the Constitution's separation of powers provisions. To meet this constitutional standing requirement, a plaintiff must demonstrate the following: (1) that she has suffered an injury in fact that is concrete and particularized and actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that the injury is likely, as opposed to merely speculative and will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff must meet these standing requirements at the time the lawsuit is filed. *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 190-91 (2000).

D'Lil failed to meet two of *Lujan*'s constitutional standing requirements. First, as the trial court correctly ruled, D'Lil did not suffer an injury in fact that was actual or imminent. *See D'Lil v. Best Western Encina Lodge & Suites*, 415 F. Supp. 1048 (C.D. Cal. 2006). Rather, any harm to D'Lil was conjectural or hypothetical – the kind of "some day" injury that the Court specifically rejected as insufficient to confer constitutional standing in *Lujan*.

Second, because it is unclear that D'Lil will ever return to the Best Western Encina Lodge once this litigation ends, any injury she suffered cannot be redressed by a favorable court decision. She thus failed to meet the third standing requirement articulated in *Lujan*. 504 U.S. at 560-61. Neither the district court nor the Ninth Circuit decisions in this case specifically addressed redressability. But this Court may properly raise standing concerns *sua sponte*. *Adarand Contractors, Inc. v. Mineta*, 534

U.S. 103, 110 (2001); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). It should consider doing so to ensure a just and lawful outcome in this case and to provide guidance to other courts.

A. D'Lil Did Not Suffer An Injury In Fact

To meet the first constitutional standing requirement, a plaintiff must suffer an injury in fact that is concrete and particularized and actual or imminent, not merely conjectural or hypothetical. *Lujan* at 560-61. If a plaintiff merely expresses "some day" intentions of returning to the site of her alleged injury – without any description of concrete plans, and failing to specify when that "some day" will be – then that plaintiff has not fulfilled this first requirement. *Id.* at 564. In *Lujan*, for example, the plaintiffs alleged that projects funded by the Department of the Interior in Egypt and Sri Lanka would harm endangered species in the areas. *Id.* at 558. Plaintiffs testified that they had previously visited the sites to view wildlife. *Id.* at 564. But the plaintiffs did not have any concrete plans to visit the sites again. Because their future plans to visit the sites of the challenged construction were unclear, this Court determined that the plaintiffs had not suffered "injury in fact" sufficient to confer constitutional standing. *Id.*

Similarly, D'Lil only expressed vague, "some day" intentions of plans to return to the Best Western Encina Lodge. Although D'Lil traveled to Santa Barbara before upon the request of her attorney, Jason Singleton, *D'Lil v. Best Western Encina Lodge & Suites*, 415 F. Supp. 2d 1048, 1059 (C.D. Cal. 2006), she did not express any specific

plans to return to Santa Barbara in connection with her work as an accessibility consultant. Evidence submitted to the district court concerning D'Lil's friendship with the Marshes, a family living in Santa Barbara, showed only that D'Lil had vague intentions of returning to Santa Barbara some day. But D'Lil never presented specific evidence, as required by *Lujan*, of definitive travel plans. *Id.*

Even assuming that D'Lil planned to return to Santa Barbara, D'Lil did not present evidence that she would be more likely to stay at the Best Western Encina Lodge than at another hotel. In fact, in earlier litigation, D'Lil testified that she preferred Ramada hotels and that a Santa Barbara area Ramada is convenient for visiting personal friends. *Id.* And, in another instance, D'Lil claimed to be particularly confident in the Radisson brand. *Id.* at 1056. In light of this lack of evidence of concrete plans to return to the Best Western Encina Lodge – and, indeed, evidence indicated that D'Lil might wish to stay elsewhere on future trips to Santa Barbara – the Ninth Circuit wrongly concluded that D'Lil suffered an injury in fact.

B. A Favorable Decision Cannot Redress D'Lil's Injury Because She Only Visited the Best Western Encina Lodge to Establish an ADA Claim

For a plaintiff to have Article III standing, it must be likely (as opposed to merely speculative) that the plaintiff's injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. If a plaintiff only visits a particular business to establish grounds for litigation against that business, it is

unlikely that the plaintiff would return to that business once her lawsuit is complete. *See, e.g., Harris v. Stonecrest Auto Care Center LLC*, 472 F. Supp. 2d 1208 (S.D. Cal. 2007). In *Harris*, a disabled plaintiff visited a Shell gas station in California hundreds of miles away from his home. *Harris*, 472 F. Supp. 2d at 1210. The plaintiff made a number of allegations regarding the accessibility of the gas station, among them that the counter inside the convenience store was too high for him and that he could not reach the gas pumps. *Id.* at 1211. The plaintiff had filed over 20 ADA claims against other businesses. *Id.*

Because the distance of the gas station from the plaintiff's home and the plaintiff's prior litigation history indicated that the plaintiff visited this particular gas station only once to establish a legal claim against it, a favorable decision could not redress plaintiff's injury. *Id.* at 1217. That is, any permanent injunction obtained in the course of that litigation might benefit future disabled visitors to that Shell station, but it could not benefit the plaintiff. *Id.* On the other hand, if a plaintiff clearly intends to return to the business after litigation is over, then a favorable decision can redress that plaintiff's injuries, and the constitutional requirement is met. *Id.*

The evidence clearly showed that D'Lil visited the Best Western Encina Lodge solely to establish an ADA claim. D'Lil, like the plaintiff in *Stonecrest Auto Care Center*, had a long history of bringing ADA lawsuits. She admitted to filing 62 prior lawsuits, raising the question as to whether she could feasibly patronize all of these firms again.

D'Lil v. Best Western Encina Lodge & Suites, 415 F. Supp. 2d 1048, 1058 (C.D. Cal. 2006). In fact, D'Lil frequently targeted hotels. In the district court, D'Lil testified that she sued Howard Johnson Express Inn in Redding, Calif., the Bel Air Motel in Redding, the Red Lion Inn in Redding, the Best Western Inn in Redding, and the Best Western Hospitality House in Redding. *Id.* D'Lil also testified that all of these cases had settled, and that she had not returned to any of these hotels after the settlement. *Id.* Nor had she checked to see if accessibility-related renovations had been accomplished. *Id.*

As the district court observed, "it appears Plaintiff declares that she intends to return to nearly every place she sues (as indeed she must in order to establish standing in federal court.)" In light of D'Lil's litigious history and inconsistent allegations made during past litigation, this Court should view her statements about future travel to the Encina Best Western Lodge with skepticism. Because it is unlikely that D'Lil would have returned to the Best Western Encina Lodge, a favorable court award would not have redressed her injury, and she lacked standing to sue.

III. FEDERAL COURTS HAVE ISSUED INCONSISTENT STANDING DETERMINATIONS IN ADA CASES

Federal courts generally examine four factors to establish the likelihood that an ADA plaintiff will return to a particular public accommodation. Among them are (1) the proximity of the place of public accommodation to plaintiff's residence; (2) plaintiff's

past patronage of defendant's business; (3) the definitiveness of plaintiff's plans to return; and (4) the plaintiff's frequency of travel near defendant's establishment. *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 947 (C.D. Cal. 2005). But, as the trial court in this case noted, reported decisions provide little guidance on how to apply and evaluate the factors. This ambiguity provides two additional reasons why this Court should grant this petition for certiorari. First, D'Lil would not have prevailed if the Ninth Circuit applied this four-factor test in a different manner. Certiorari is thus necessary to ensure a just outcome in this case. Additionally, ambiguity in this area of law shows that additional guidance is needed to ensure just results in future litigation.

First, the lower courts disagree on the relevance of proximity in evaluating the likelihood of a plaintiff's return where the relevant place of public accommodation is a hotel. In *Brother v. Tiger Partner, LLC*, a Florida federal district court found no standing where the plaintiff lived more than 280 miles away from a particular hotel and only traveled there twice a year. 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004). But in *Access 4 All v. Wintergreen Common Partnership Ltd.*, a Texas district court concluded that the proximity factor should not be considered in cases involving hotels. 2005 WL 2989307, 3-4, 2005 U.S. Dist. LEXIS at 10-11 (N.D. Tex. Nov. 7, 2005).

Had the Ninth Circuit considered proximity and followed the approach of *Brother v. Tiger Partner*, it would have reached a different result. D'Lil lives about 400 miles away from the Encina

Best Western Lodge and typically traveled to Santa Barbara between 1 to 3 times per year. In *Brother v. Tiger Partner*, the plaintiff lived slightly closer to the defendant hotel (280 miles away) and made a similar number of visits per year (about two) to the city in which it was located. 317 F. Supp. 2d at 1373. The Middle District of Florida found that this lack of proximity to the plaintiff's residence relevant to standing. Yet the district court determined, like the court in *Access 4 All*, that the proximity of D'Lil's home to the Best Western Encina Lodge was of minimal relevance. *D'Lil*, 415 F. Supp. 2d at 1055.

Some courts have also found that the lack of prior patronage by the plaintiff negates the possibility of future injury at a business. *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1045 (C.D. Cal. 2005). In *Brother v. CPL Investments*, a Florida federal court similarly found that, where an ADA plaintiff never stayed at a particular hotel and did not keep a subsequent reservation, this plaintiff lacked standing in part based on lack of past patronage. 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004).

There is also confusion in the lower courts involving the relevance of a plaintiff's patronage of other locations of a particular chain. In *Pickern v. Holiday Quality Foods*, for example, the court found standing in a case involving a particular Holiday store near the plaintiff's grandmother's house because the plaintiff frequently shopped at other Holiday branches. 293 F.3d 1133 (9th Cir. 2002). *See also Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042 (C.D. Cal. 2005) (plaintiff had standing to pursue his ADA claim because the defendant

restaurant was part of a chain, which the plaintiff frequented). On the other hand, in *Brother v. Tiger Partner*, a Florida court rejected a nearly identical argument regarding plaintiff's past patronage: "That [plaintiff] has visited the Best Western Deltona Inn in the past proves nothing. And in view of his extensive litigation history, Mr. Brother's professed intent to return to the property is insufficient." 331 F. Supp. 2d at 1374.

Had the Ninth Circuit considered D'Lil's lack of past patronage of Petitioners' hotel or other Best Western locations, it might have reached a different result. D'Lil admitted that she never stayed at the Encina Lodge before the visit giving rise to her lawsuit. 415 F. Supp. 2d at 1056. Nor did D'Lil state a preference for the Best Western brand, though such a preference would have been relevant. In fact, in other lawsuits, D'Lil claimed a "certain preference for the Ramada brand" and alleged that she had confidence in the Radisson brand. *Id.* Though the district court found that consideration of this factor weighed against plaintiff, the Ninth Circuit did not directly address it. 415 F. Supp. 2d at 1048.

The lower federal courts should consider past patronage. ADA plaintiffs who regularly patronize a business are more likely to suffer the injuries in fact necessary to confer constitutional standing. Similarly, ADA plaintiffs who visit businesses multiple times may have their injuries redressed through favorable court decisions. Weighing this factor appropriately will ensure that cases brought only to extract quick settlements do not waste court resources.

Courts are also divided over the evidence required to establish plaintiff's intent to return to a business. Where a plaintiff lacks concrete plans to return, a court must ensure that the plaintiff's professed intent to return is sincere and supported by facts. Many courts have thus concluded that a "serial plaintiff's extensive litigation history can undermine his professed intent to return." *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d at 1046. While plaintiff Molski sued over 400 businesses across the state of California within a short time period, Molski returned to very few of those firms following litigation. *Id.* *See also Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d at 948 ("the filing of hundreds of lawsuits may impact Mr. Molski's credibility and the believability of his assertions that he intends to and will return to Arby's"). Similarly, a [Florida] district court found it "simply implausible" that a plaintiff might return to all 54 of the different places of public accommodation that she sued. *Brother v. Tiger Partner*, 331 F. Supp. 2d at 1368.

Had the Ninth Circuit weighed this factor appropriately, it likely would have found that D'Lil lacked standing. D'Lil presented no evidence of concrete plans to return to Santa Barbara, nor any concrete plans to return to the Best Western Encina Lodge in particular. *D'Lil*, 415 F. Supp. at 1059. In fact, as discussed above, D'Lil testified in earlier litigation that she might be more likely to stay at other hotel chains that she preferred. *Id.* at 1058. The district court also found that D'Lil's vague statements about future plans to return to Santa Barbara lacked credibility because of her long history of litigiousness. *Id.* at 1059. It thus

concluded that this factor weighed against the plaintiff. *Id.* Yet the Ninth Circuit again declined to give this factor much weight in its analysis.

The lower federal courts should look closely at the concreteness of an ADA plaintiff's plans to return to a particular business. Doing so will ensure that only meritorious ADA claims go forward and extinguish claims brought merely to extract cash payments.

Courts have also issued inconsistent decisions on whether the frequency of plaintiff's travel plans is relevant to standing determinations. *See, e.g., Wilson v. Kayo Oil Co.*, 535 F. Supp. 2d 1063, 1069 (S.D. Cal. 2007); *Molski v. Kahn Winery*, 405 F. Supp. 2d 1160, 1168 (C.D. Cal. 2005). In *Access 4 All*, for example, a court found that the plaintiff lacked standing because, while he presented evidence that he travelled frequently, he had not presented any evidence that he would return specifically to the De Soto area. 2005 WL 2989307 4-5, 2005 U.S. Dist. LEXIS 26935 at 12-13. Likewise, in *Brother v. Tiger Partner*, a plaintiff who traveled 1 to 2 times per year to a city 280 miles away from his home lacked standing to bring a claim against a hotel located in that city. 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004). By contrast, in *Assoc. for Disabled Americans v. Claypool Holdings LLC*, the court found that the plaintiff had suffered an injury in fact because he traveled to Indianapolis, where the defendant's hotel was located, every 1 to 2 years for family reunions and for alternating Thanksgiving and Christmas holidays. 2001 WL 1112109 (S.D. Ind. 2001).

Because D'Lil typically traveled 1 to 3 times per year to Santa Barbara, where the Encina Lodge is located, this factor supported a finding that D'Lil did not have standing. As noted above, D'Lil traveled to Santa Barbara as infrequently as the plaintiff in *Brother v. Tiger Partner*. Just as the plaintiff lacked standing in *Tiger Partner*, D'Lil also lacked standing. It is true that, if the Ninth Circuit had looked to *Claypool Holdings* instead of *Tiger Partner* for guidance, it might have reached the opposite conclusion regarding this factor. But taking the approach of *Claypool Holdings* will make it more difficult to keep frivolous ADA lawsuits out of federal courts. Moreover, the differing outcomes only underscore why certiorari is necessary to resolve confusion within the lower courts.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition should be granted.

Respectfully submitted,

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